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Supreme Court Decisions

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PARTNERSHIP—DEMURRER—FEDERAL PERMITS—JURISDICTION OF THE DEPARTMENT OF THE INTERIOR—*McNulty et al. vs. Kearin*—No. 13986—*Decided June 14, 1937—District Court of Huerfano County—Hon. A. F. Hollenbeck, Judge—Affirmed.*

FACTS: The judgment for review was a decree whereby the court charged a certain federal coal prospecting permit—standing in the name of the defendant, McNulty, as executrix under the last will and testament of Peter Fern, deceased—with a trust, as to a one-half interest therein, in favor of the plaintiff, Kearin, defendant in error. Fern had been a co-partner of plaintiff's with a view to the ownership, leasing, prospecting, development and operation of coal lands. In 1925 they jointly acquired from the United States a coal mining lease on a tract of 240 acres, and in 1927, they jointly procured from the United States a coal prospecting permit on a tract of 360 acres adjacent to the other tract. This permit was thereafter renewed, expiring March 5, 1931. About a week prior to the expiration of the permit, Fern commenced an action to dissolve the partnership existing between himself and Kearin. On April 18, 1931, while the action was pending, Fern applied to the United States for a new coal prospecting permit in his sole name on the land covered by the original permit granted to him and Kearin jointly. On June 19, 1931, Fern died. Fern's application for a new permit was duly kept alive by proper extensions officially granted for the payment of the $350.00 rental, which Kearin claims he eventually paid the government. The defendant requested that the permit applied for by Fern be issued instead to her. Kearin filed a protest in the land office against the issuance of such a permit to the defendant, setting forth his claim as a partner, but the Department of the Interior properly ruled that it has no jurisdiction over equitable issues and dismissed the protest. The permit received by and in the name of the defendant as executrix was the property right subjected in the trial court to the declaration of trust that was complained of.

HELD: 1. All legal and equitable claims of Kearin's were not finally adjudicated in the partnership dissolution action brought by Fern because that complaint did not deal in any way with the coal prospecting permit for which Fern had applied and which was issued—nearly six months after entry of the decree—to his estate, represented by the executrix.

2. The overruling of a demurrer for alleged misjoinder of parties is immaterial, whether it has merit or not, if the defendants plead over, for it waives any error in connection therewith.

Opinion by Mr. Justice Bouck.

OIL AND GAS—NONSUIT—WAGE ACT—ORIGINAL UNDERTAKING—RATIFICATION—STATUTE OF FRAUDS—*The Mayer Oil Company et al. vs. Schnepf*—No. 14017—*Decided June 7, 1937—County Court of Larimer County—Hon. Albert P. Fisher, Judge—Affirmed.*

FACTS: The parties shall hereinafter be referred to as they appeared in the trial court: Defendant in error as plaintiff, and plaintiffs in error as defendants. Action was brought by the plaintiff to recover for services rendered and labor performed by himself and his assignors in connection with certain oil well drilling operations. At the conclusion of plaintiff's case the court denied defendant's motion for nonsuit and defendants elected to stand upon the motion. Judgment was thereupon entered in favor of the plaintiff. The plaintiff and his assignors were employed by Mosher, the contractor, to work upon the well, and on January 24, 1932, he was indebted to them for back wages. The plaintiff and his assignors suspended work and refused to continue until they were paid. Thereupon there was executed an original agreement and undertaking on the part of the defendant companies to pay the plaintiff and his assignors for their labor, which was for the purpose of inducing the men to return to work on the land which the companies were interested in. The complaint further alleged liability against the defendants under the provisions of the "wage act" which renders the defendants liable by operation of law, to employees of a contractor for work done for the private corporations. The defendants questioned the constitutionality of this act and also contended that plaintiff's cause of action, in so far as it was based upon said act, was barred by the one-year statute of limitations.

HELD: 1. A motion for nonsuit admits the truth of the evidence produced by the plaintiff in the sense most unfavorable to the defendants and every inference of fact legitimately deductible therefrom.

2. The fact that the subsequent payments to the men were made from the funds of one of the companies might well indicate the promise was made on behalf of the corporations and ratified by them.

3. When the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the statute.

Opinion by Mr. Justice Knous, Mr. Justice Hilliard not participating.

NEGLIGENCE, CONTRIBUTORY, PER SE—EVIDENCE—STATUTES, INTERPRETATION OF—*Grunsfeld vs. Yenter*—No. 14088—*Decided June 1, 1937—District Court of Weld County—Hon. Frederic W. Clark, Judge—Affirmed.*

FACTS: The parties will be referred to as they were in the trial court, where the plaintiff, defendant in error, recovered judgment against the defendant in the sum of $541.50 for personal injuries caused by defendant's alleged negligent operation of his motor vehicle. About 7:00 o'clock on the evening of July 12, 1935, while the plaintiff was

driving his automobile in a southerly direction along the Greeley-Denver highway at a speed of approximately 35 to 40 miles per hour, he ran into the rear end of the defendant's automobile, which was standing on the pavement, headed in the same direction. There had been a heavy shower and defendant had stopped his car during the heaviest part of the rain. Because of the rain the defendant's car would not start, and he was sitting in his car trying to start the engine at the time of the impact. The shoulders along the highway were well graveled and the ditch alongside of them was not over two feet deep. Plaintiff admitted that he saw defendant's car about a block and a half away, but assumed that it was proceeding in the same direction as his own at the usual rate of speed and states that he did not realize until a few "instants" before the crash that defendant's car was standing still. The question involved was whether or not the plaintiff was conclusively guilty of contributory negligence under Sections 73 (a), c. 122, S. L. 1931, p. 532.

HELD: 1. The courts retain the duty of giving the statute a reasonable interpretation, because it cannot be maintained that failure to comply literally with all the provisions of the statute in all circumstances constitutes negligence *per se*.

2. "A party suddenly realizing that he is in danger from the negligence of another is not to be charged with contributory negligence for every error of judgment when practically instantaneous action is required."

3. Where the evidence is conflicting, findings thereon will not be disturbed, since every inference fairly deducible from the evidence is drawn in favor of the judgment.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke and Mr. Justice Hilliard concur.

FUTURE INTERESTS—INTERPRETATION OF ISSUE—LATENT AMBIGUITIES—WATER RIGHTS—DEEDS—APPURTENANCE—*Haselwood vs. Moore et al.*—No. 13897—*Decided June 1, 1937—District Court of Jefferson County—Hon. Samuel W. Johnson, Judge—Affirmed.*

FACTS: In assertion of her rights, claimed by virtue of a vested remainder, plaintiff in error, as plaintiff below, brought suit in ejectment against possession under a life estate which had terminated. Complaining that the trial court erroneously determined that she was entitled to a two-thirds interest only in the land, and to none of certain claimed water rights, she assigned error to the judgment. She prayed for damages for the wrongful detention and use of the premises after the termination of the life estate and was awarded judgment therefor in the sum of $730.47, to which Alice T. Moore, one of the defendants in error, assigned cross error. Prior to August 9, 1901, George H. Church was the owner in fee simple of certain land. In his lifetime he had much to do with acquiring water rights and ditches for conveyance thereof in that particular locality where his land was situated. On the above date he conveyed the property to his daughter, Mary C. Tucker, by quitclaim

deed, which on its face clearly conveyed a life estate to Mary C. Tucker with remainder to her issue, if any. If no issue, the property to revert to the grantor or his heirs. He did not say, "children living at the time of her death" or "children living at the time of the execution of the deed." His deed was silent in respect to water rights, but it did make a reservation from the conveyance of land occupied by a lake or such land as might be occupied by future enlargements, and a special reservation of the land covered thereby, and for a right of way for an irrigating ditch crossing the land. On the death of Mary C. Tucker the property descended to her two living children, Alice T. Haselwood and Alfred R. Tucker, and to the heirs of Eleanor Tucker Truder, who predeceased Mary. These latter children, heirs of Eleanor, claim a one-third interest in and to the property. After the death of Mary, Alfred C. Tucker, her son, quitclaimed his interest in the land to his sister, Alice T. Haselwood. Plaintiff contends that she thereby became entitled to the entire remainder of the lands, upon the theory that it was the grantor's intention that the remainder rest only in children of, and surviving, Mary C. Tucker at the time of her death. She also contends that under the "appurtenance" clause of the deed the grantor intended to and did convey 50 inches of water with the land.

HELD: 1. Findings on the facts upon disputed questions will not be disturbed on review.

2. The deed contains no latent ambiguities, and therefore leaves no room for oral testimony in explanation thereof or to vary its terms.

3. Under the terms of the deed issue meant children and children's children.

4. The court will not by implication do for a grantor that which was easily within his power to so express and grant.

5. There was no conveyance of any water by the deed and it was not sufficiently shown that any water ever was used on the land, so as to bring it within the category of an appurtenance.

6. Any arrangement or agreement to take possession of the premises and receive the rents and profits, could exist no longer than the life estate of the party granting such privilege.

Opinion by Mr. Justice Holland. Mr. Chief Justice Burke and Mr. Justice Knous concur.

SUPREME COURT RULE NO. 32—ASSIGNMENTS OF ERROR—*Smookler vs. Nicoll Bros. Oil, Inc.*—No. 14107—*Decided June 7, 1937—County Court of Denver—Hon. George A. Luxford, Judge—Affirmed.*

HELD: That the assignments of error: "that judgment is contrary to the law" and "that judgment is contrary to the evidence," are no compliance with Supreme Court Rule No. 32 and present nothing for review.

Opinion by Mr. Chief Justice Burke. Mr. Justice Hilliard and Mr. Justice Bakke concur.

TORTS—DAMAGES, MINIMIZING—GRATUITOUS HOSPITALIZATION—FAMILY CARE—*City of Englewood vs. Bryant*—No. 14018—*Decided May 24, 1937—District Court of Arapahoe County—Hon. S. W. Johnson, Judge—Reversed.*

FACTS: Plaintiff brought action against the city, claiming damages in the sum of $400 for medical attendance, hospitalization and nursing, plus $5,000 for physical injuries, pain and suffering, all occasioned by a fall on a defective sidewalk. On a verdict in her favor for $2,700, judgment was entered. To review that judgment the city prosecuted error.

HELD: 1. It is the duty of the injured party to minimize damages by reasonable care and obedience to medical directions if circumstances are such as to make it possible to do so.

2. Where an injured person has been cared for gratuitously by a hospital belonging to the county and state, and her possible liability for this care, to the state, is so remote as to be purely speculative, she will not be allowed to recover this expense from the defendant.

3. Where the injured party has been cared for by her mother, the city cannot claim the benefit of her mother's gratuitous service, but must pay for the services so rendered.

Opinion by Mr. Chief Justice Burke. Mr. Justice Hilliard and Mr. Justice Bakke concur.

EQUITY—TESTAMENTARY DISPOSITION OF PROPERTY—CAPACITY—BURDEN OF PROOF—*Burton et al. vs. Burton et al.*—No. 14030—*Decided June 1, 1937—District Court of Denver—Hon. H. E. Munson, Judge—Affirmed.*

FACTS: This was a suit brought in equity to set aside certain transfers of property made by Burton to the defendants before his death. This was a case of an elderly, ill, but as the evidence brought out, mentally competent man, still hoping and expecting recovery, concluding to finally dispose of his property, and deliberately choosing between a wife in name only, of some twenty months, whom he did not greatly trust, and adult children by a former marriage, whom he loved and trusted. The wife's case rested primarily upon the alleged mental incapacity of her husband. The trial court found against her and gave defendants judgment for costs.

HELD: 1. The burden of proof to show alleged improper influence is upon he who asserts it.

2. Blood relationship alone is insufficient to support a claim of special trust and confidence so as to place the burden of proof upon the defendants.

3. The Supreme Court assumes the correctness of the findings of fact made on conflicting evidence by the trial court.

Opinion by Mr. Chief Justice Burke. Mr. Justice Knous and Mr. Justice Holland concur.

WILLS — TESTAMENTARY TRUST — EQUITABLE CONVERSION — INTEREST METHOD OF DETERMINING AVERAGE INVESTMENT AND NET PERCENTAGE INCOME—*In re: Estate of Fred Herrington, deceased. Donaldson, etc. vs. Herrington, etc.*—No. 13935—*Decided June 21, 1937—County Court of Denver—Hon. George A. Luxford, Judge—Modified and Affirmed.*

FACTS: Herrington, testator, bequeathed the sum of $30,000 in trust for the use and benefit of two nieces. The bequest provided that the sum be invested in income-bearing securities and that the income be paid over to the beneficiaries, and that trustee be at liberty to use any part or all of the principal necessary for the maintenance and education of the nieces. The trust fund was not set up or segregated from the estate, nor were any securities, legal for investment of trust funds, set aside for the fund. Since the will was admitted to probate, the nieces have received in excess of $29,000. The newly appointed trustee demands that the executors treat the $30,000 bequest as equitably converted, as of the date of death of the testator, into such securities as are authorized by statute (Sec. 5269, C. L. 1921), and that the trustee be paid $30,000 plus whatever income thereon on the unpaid balance at the rate said converted fund would have earned if it had been converted into securities legal for investment of trust funds under the laws of Colorado, less any prior payments made to the beneficiaries or their trustee. The County Court held that there was an equitable conversion of the funds and that the interest considered earned would be the same as the entire estate earned after deducting from the gross income, legal expenses and executors' fees, in arriving at the net figure used in the computation of the interest.

HELD: 1. The Colorado statute (Sec. 5269, C. L. 1921) does not provide for any minimum rate of interest at which funds of a deceased person's estate shall be invested, but enumerates a number of types of securities, including U. S. Government Bonds, which shall be deemed legal investments, but the income of such government bonds is not necessarily the legal yardstick to be applied in determining the amount of income to which the trust fund is entitled.

2. Where it appears that the investments of the estate funds were not injudicious or ill-advised and it was the undoubted intention of the executors in the interest of all the beneficiaries that the property of the estate be so invested, safety considered, as to bring in as large an income as could be obtained, it is fair and just to use that income as the basis for the income which should have been derived on the trust fund provided for in the will.

3. "The rate of interest should be such as a trustee by careful, conservative investment in suitable trust investments could reasonably realize as interest or income."

4. In determining the average investment to be used in ascertaining the net percentage income on the estate as a whole, it was not error for the trial court to include nearly $41,000 worth of nonincome pro-

ducing items in an estate, such as this, where the average investment was over $127,000.

5. The items of legal expenses and executors' fees should not have been deducted from the gross income in arriving at the net for the purposes of this computation. The expenses of administration are not chargeable against a money legacy where the residuary corpus is sufficient to pay such items.

Opinion by Mr. Justice Knous. Mr. Justice Hilliard and Mr. Justice Bakke concur.

WILLS—CONSTRUCTION—*Mellor et al. vs. Bennet et al.*—No. 14036—*Decided June 21, 1937*—*District Court of El Paso County*—*Hon. John M. Meikle, Judge*—*Affirmed.*

HELD: 1. Where the intention of the testator can be reasonably learned from an examination of the entire will, such intention must govern.

2. Will considered and determined that the construction adopted by the District Court (that the true residuum of the estate begins with sub-section (3) of Article V of the will, and that all costs of administration, including court costs, attorneys' and executors' fees and taxes must be paid from the assets contained in said sub-section (3) of Article V, if the assets contained therein are sufficient to pay such charges, and not out of the specific bequests found in prior clauses in the will) is the more natural and reasonable one.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke and Mr. Justice Hilliard concur.

MORTGAGES — TRUST DEEDS — LIENS — PREFERENCE — ASSIGNMENTS—GARNISHMENTS—RENTS AND PROFITS—REAL ESTATE—TRUST DEED AS CHATTEL MORTGAGE—*Fisher, etc. vs. Norman Apartments et al.*—No. 13963—*Decided June 21, 1937*—*District Court of Denver*—*Hon. James C. Starkweather, Judge*—*Reversed.*

FACTS: B executed deed of trust to the International Trust Company covering certain property on which the Norman Apartments are now situated securing a bond issue of $350,000. Later the property was conveyed by B to Norman Apartments, Inc., which assumed and agreed to pay the encumbrance. Thereafter, a judgment was obtained against the apartments and assigned to plaintiff. Subsequently, an agreement was entered into between B, the Norman Apartments, Inc., and certain persons constituting a "bondholders' protective committee," to have the resident manager, E, of the apartments, continue to collect rents and manage the apartments and pay into the Colorado National Bank such funds and to pay the ordinary bills in connection with such management by check, countersigned by a representative of the bondholders' committee, and drawn on such funds. Foreclosure of the Trust Deed was instituted but no receivership was demanded. After the decree of foreclosure was entered, execution and garnishment on the judgment

was issued and garnishee summons served on E and the Colorado National Bank, who answered the negative. The International Trust intervened, claiming the property and funds in the hands of the bank and E. The plaintiff traversed the answers, and from a judgment on the traverse in favor of the garnishees and on the petition in intervention in favor of the trust company, plaintiff prosecutes writ of error.

HELD: 1. The contract was not an assignment of rents. E, the resident manager, was the agent of the Norman Apartments, Inc., and the moneys were collected for the benefit of the Norman Apartments, Inc., in the manner usual before the execution of the contract, and this is consistent with possession remaining in the corporation and inconsistent with either an assignment of the rents or bills receivable or a surrender of possession to the bondholders' committee. The contract was a restriction on expenditures which might voluntarily be made by the manager, and it did not pass title to the funds or determine the rights of the judgment creditors to proceed against them for satisfaction of their claims.

2. The assignment of rents in the trust deed did not give the mortgagee a right to such rents except under certain definite conditions. The mortgagors did not abandon possession, nor was a receiver appointed.

3. A mortgagee before entry has no specific lien upon the rents. He must first take possession under the mortgage.

4. Even when the mortgage expressly covers the land, "together with rents, issues and profits," the language will be construed as referring to rents and profits accruing after entry by mortgagee, in absence of specific language pledging the rents accruing before default while mortgagor is in possession.

5. "The contract itself did not constitute a preferred payment; it was but the means by which a preference was intended later to be effected." There is a vast difference in law between an order to pay a debt out of a particular fund and promise to pay out of such fund. " 'An agreement to pay out of a particular fund, however, clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. * * * The assignor must not retain any control over the fund—*any authority to collect, or any power of revocation. If he does, it is fatal to the claim of the assignee.*' "

6. Where a trust deed contains a provision that any personal property owned or thereafter acquired and used by the grantors in the conduct of a hotel business in the buildings, without specifically describing it, it is subject to the same rules as a chattel mortgage for as to such property it is a chattel mortgage, and the personal property must be so described that it may be identified or possession taken prior to service of such garnishment—as to such property it was not notice and it was void as to the judgment creditor.

Opinion by Mr. Justice Young. Mr. Justice Hilliard not participating. Mr. Justice Bouck dissenting.

WATER RIGHTS—PRIORITIES—MAP AND STATEMENT—*The San Luis Roller Mills vs. The San Luis Power and Water Company*—No. 13909—*Decided June 14, 1937*—*District Court of Costilla County*—*Hon. John I. Palmer, Judge*—*Reversed.*

FACTS: The action involved a controversy between two claimants in a general water adjudication.

HELD: 1. As between two rival claimants, both having failed to come within the exact provisions of the statute, i. e., in not having filed a map and statement within the period prescribed by statute, the relative priorities of the claims are properly determined by the dates on which the particular appropriations were respectively consummated by actual diversion of the water.

Opinion by Mr. Justice Bouck. Mr. Chief Justice Burke and Mr. Justice Young concur.

INSURANCE—TOTAL DISABILITY—USUAL OR ORDINARY WORK—COMPENSATION FROM WORK AS AFFECTING TOTAL DISABILITY—*Denton vs. The Prudential Insurance Company of America*—No. 13977—*Decided April 4, 1937*—*District Court of Denver*—*Hon. Otto Bock, Judge*—*Affirmed.*

FACTS: The parties hereinafter will be designated as plaintiff and the insurance company. Action brought by plaintiff upon the total disability clause of a group policy contract of insurance carried by plaintiff's employer, and was based on a heart condition which allegedly caused him to be totally and permanently disabled within the meaning of the contract. Plaintiff was a collector for the insurance company. On April 30, 1933, while playing baseball at a Sunday School picnic, he suffered a heart attack and fainted. Following his illness, the company took some of his territory away and some of his associates helped him with minor parts of his work, but he continued working with no decrease in compensation until he was discharged for an alleged shortage in his accounts on February 9, 1935. At the trial, plaintiff's counsel offered to show the plaintiff was not short in his accounts, which offer was denied, and he did not offer any evidence to show that he was dismissed on account of his physical condition. At the close of the plaintiff's case in the District Court, the insurance company filed a motion for a nonsuit, which was granted and the action dismissed.

HELD: 1. Total disability does not mean absolute helplessness; it is enough to meet the requirements of the insurance contract if the insured is entirely incapacitated for work or business.

2. Contracts of insurance are to be construed most strongly against the company and liberally construed in favor of the insured, but the court may not substitute an entirely different contract from that which the parties have entered into.

3. The insured may not be regarded as totally disabled as of a time when, although sick, diseased, injured, or otherwise afflicted, he continues to do his ordinary work, or is regularly performing his usual

and customary duties. The plaintiff admits continuing his usual work at substantially the same compensation up until the time of his discharge, and, therefore, the jury would not have been justified under the law in rendering a verdict in any amount for the plaintiff.

4. Disability to engage in any occupation and perform any work for compensation or profit as set forth in an insurance contract contemplates that the compensation for profit to be received from the occupation engaged in, or work done, shall in a fair sense be remunerative, and not merely nominally so.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke and Mr. Justice Hilliard concur.

TAXES—TAX-EXEMPT PROPERTY—CHARITABLE ORGANIZATIONS—CONSTITUTIONAL LAW—INCIDENTAL USE OR INCOME—REVENUE—*Creel vs. The Pueblo Masonic Building Association*—No. 13918—*Decided April 4, 1937*—*District Court of Pueblo County*—*Hon. John H. Voorhees, Judge*—*Reversed.*

FACTS: The association, or plaintiff, brought an action against Creel in his capacity as County Treasurer of Pueblo County, herein mentioned as defendant, seeking to enjoin him from selling certain property of the association for non-payment of taxes, and to remove the same from the tax roll as exempt from taxation. Plaintiff owned a five-story building, three floors of which are used for rental purposes and which are not directly or even indirectly used by the association for any other purposes than that of producing revenue, the same purpose for which buildings are owned and maintained by private persons and corporations. The situation presents the question whether an admittedly charitable organization deriving revenue not merely incidental to the use and management of property otherwise used for its charitable purposes, but from property used for the sole purpose of producing revenue to be used in carrying out such purposes, is entitled to have property so used exempted from taxation. The case comes under Section 5 of Article X of the Constitution, and Section 7198, C. L. 1921.

HELD: 1. Whether in any given case property is or is not exempt, must be determined by considering all of the facts and circumstances, and the intentions and purposes of those in charge of the institution to which the property belongs respecting the use and occupation of such property.

2. Mere incidental income from property clearly not maintained for the principal objective of producing income does not take it out of the exempt class.

3. If the entire property constitutes a unit, and it is reasonably necessary to effect the objects of the institution, and it is used solely for that purpose, it is exempt from taxation.

4. In the present case it clearly appears that it does not present a case of mere incidental use or incidental income from the property otherwise "reasonably necessary to effect the objects of the institution."

Opinion by Mr. Justice Young.

CONTRACTS—GIFTS—DRAWING OF A LUCKY NUMBER—*Slagle vs. Construction Progress Exposition*—No. 13922—*Decided April 4, 1937*—*District Court of Denver*—*Hon. Robert W. Steele, Judge*—*Affirmed.*

FACTS: Slagle, plaintiff below, sued to replevy an automobile from the defendant corporation. On a motion a verdict was directed in favor of the defendant. Plaintiff now seeks reversal. Plaintiff relies upon the contention that the defendant made a gift to her of the automobile. The gift is asserted to have been effected through the drawing of a "lucky number" from among all the numbers received in connection with admission tickets by the persons visiting the defendant's "fair," where numerous merchants exhibited their wares. The automobile was not to be delivered until the close of the fair. It is admitted that the fair closed without any delivery being made to the plaintiff.

HELD: 1. No contract right could arise out of the situation here presented, lacking as it does all the essential elements of a legal contract.

2. There was no gift, for a gift presupposes an effectual delivery.

Opinion by Mr. Justice Bouck. Mr. Chief Justice Burke and Mr. Justice Young concur.

INSURANCE—FAMILY POLICY—MEMBER OF THE FAMILY—EVIDENCE—ADMISSION OF TESTIMONY—*International Service Union Company vs. Espinoza*—No. 13981—*Decided April 4, 1937*—*District Court of Conejos County*—*Hon. John I. Palmer, Judge*—*Affirmed.*

FACTS: Espinoza sued the company for $800 on the death of his daughter, Stella, under a family policy of insurance. The policy "includes all members of the immediate family named herein." It makes but two exceptions, sons or daughters who marry are automatically excluded. If husband and wife separate, the company reserves the right, "by sending them written notice" to cancel as to any or all members. The parents did not separate, no attempt to cancel was made, and Stella did not marry. The company contends that inasmuch as Stella had left home and entered upon a course of training or probation preparatory to becoming a Carmelite Nun, she was not a member of the family.

HELD: 1. The policy must be construed most strongly against the company which wrote it, and the company's contention is without merit.

2. If improper testimony is admitted in evidence, the court is presumed to have disregarded it.

3. If no objection was made to an order dispensing with the motion for a new trial, it cannot later be presumed to be prejudicial.

Opinion by Mr. Chief Justice Burke. Mr. Justice Knous and Mr. Justice Holland concur.

WILLS—ORAL AGREEMENTS TO MAKE WILLS—CONSTRUCTIVE TRUST—EQUITY—STATUTE OF FRAUDS—RESULTING TRUSTS—PAROL TESTIMONY—MUTUAL WILLS—COSTS—*Re: Estate of Doerfer vs. Rolf et al.*—No. 14040—*Decided April 4, 1937—District Court of Arapahoe County—Hon. H. E. Munson, Judge—Affirmed.*

HELD: 1. Where mutual or reciprocal wills have been made pursuant to an oral agreement which has been executed by one of the testators dying without having made any different testamentary disposition of his property and the other has accepted the benefits accruing to him under the will of the deceased, the agreement becomes obligatory upon the survivor or may be enforced in equity against his estate, notwithstanding the fact that he has by will distributed the estate otherwise.

2. Where the caveat makes all of the formal allegations which are required by Section 5211, C. L. 1921, by alleging objections of the first class: those pertaining to the issue as to whether the will filed for probate is the last will of the testator, as is the situation here, there is no object in requiring the pleader to reaffirm, by reference or otherwise, these formal matters and to properly plead the objections of the second class: those relating to the legality of the contests of the will submitted.

3. Under Supreme Court Rule 8, an objection not presented to the lower court in the motion for a new trial is in the Supreme Court precluded. The Supreme Court must pass upon the cases brought to it upon the basis of the record and proceedings in the trial court.

4. Where the evidence on a question is clear, convincing and uncontradicted, the court, if it so desires, is justified in taking the question from the jury and directing a verdict upon the issue.

5. Costs are properly taxed against the losing party.

Opinion by Mr. Justice Knous. Mr. Chief Justice Burke and Mr. Justice Holland concur.

CONTRACT—MODIFICATION OF—WAIVER—EVIDENCE—INSTRUCTIONS—JURY—DISPUTED QUESTIONS—*Jensen vs. Bohm Memorial Co.*—No. 13799—*Decided April 5, 1937—County Court of Denver—Hon. George A. Luxford, Judge—Affirmed.*

FACTS: Plaintiff in error is seeking reversal of a judgment of $1,100 entered against her in favor of defendant in error upon a jury verdict. This amount was alleged to be due as the balance of the contract price for a marble memorial statue placed in her home, upon her order, by defendant in error. Herein reference will be made to the parties as plaintiff and defendant. Plaintiff was employed by defendant upon written contract to erect in defendant's home a memorial of Italian marble in likeness of a bronze statue located on the Mullen plot in Mount Olivet Cemetery. $500 was paid at the execution of the agreement, the balance of $1,100 to be paid upon completion of the work. The contract provided that no modifications would be recognized unless

the same is in writing, signed by the parties thereto. Subsequent modifications as to the statue, which were made at the defendant's request, were written in the carbon copy of the original contract delivered to defendant, and signed by Anton Bohm, president of the plaintiff company, but not signed by defendant. When the statue was placed in defendant's home, she signed the following receipt: "One 'Christ' marble statue, Received in good condition as per contract." Defendant at the time said: "I think that it is a beautiful statue of 'Christ.'" The evidence discloses that the statue and base were not of the exact dimensions stipulated in the original contract. The modified contract upon which plaintiff relies permitted some variation; the variation in the statue was from one to three inches as to the height of the statue and size of the base.

HELD: 1. The disputed question was submitted to the jury on instructions which were manifestly fair, and their finding that the modified instrument was the ultimate contract between the parties; that defendant waived the signing thereof; that she consented to the modification; and that there was a full compliance by plaintiff with the terms of the final contract, are conclusive in the matter.

Opinion by Mr. Justice Holland. Mr. Chief Justice Burke and Mr. Justice Knous concur.
